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Television, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
CENTRAL DISTRICT

WILLIAM S. NYE a/k/a BILL NYE, an
individual; JAMES MCKENNA, an
individual; ERREN GOTTLIEB, an
individual; ABLESOFT, INC., a Pennsylvania
corporation f/k/a RABBIT EARS
PRODUCTIONS, INC; CASCADE PUBLIC
MEDIA d/b/a KCTS-TV, a Washington public
benefit corporation,

Plaintiffs,

v.

THE WALT DISNEY COMPANY, a
Delaware corporation; BUENA VISTA
TELEVISION, LLC, a California limited
liability company f/k/a BUENA VISTA
TELEVISIONS, INC.,

Defendants.

CASE NO. BC 673 736

**DEFENDANT BUENA VISTA
TELEVISION, LLC'S NOTICE OF
MOTION AND MOTION FOR
SUMMARY ADJUDICATION OF
CLAIMS BASED ON
INCONTESTABILITY PROVISION AND
STATUTES OF LIMITATION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

[Evidence in Support Thereof, Separate
Statement of Undisputed Material Facts,
Request for Judicial Notice, and *Proposed*
Order Filed Concurrently Herewith]

Date: August 7, 2019
Time: 8:30 a.m.
Location: Dept. 20
Judge: Hon. Dalila Corral Lyons

File Date: August 24, 2017
Trial Date: September 16, 2019

RESERVATION ID: 370794604324

1 **TO THE HONORABLE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD**
2 **HEREIN:**

3 **PLEASE TAKE NOTICE** that, on August 7, 2019, at 8:30 a.m., in Department 20 of the
4 above-captioned Court, located at 111 North Hill Street, Los Angeles, CA 90012, the Honorable
5 Dalila Corral Lyons presiding, Defendant Buena Vista Television, LLC (“BVT”) will and hereby
6 does move the Court, pursuant to Code of Civil Procedure Section 437c(f)(1), for an order
7 granting summary adjudication in favor of BVT and against Plaintiffs William S. Nye (“Nye”),
8 James McKenna (“McKenna”), Erren Gottlieb (“Gottlieb”), Ablesoft, Inc. (“Ablesoft”), and
9 Cascade Public Media d/b/a KCTS-TV (“KCTS”) (collectively, “Plaintiffs”) as set forth below.

10 **As to Nye:**

11 **ISSUE ONE:** Each of Nye’s claims that arise from or are based on participation
12 statements issued prior to January 8, 2012 should be summarily adjudicated in BVT’s favor,
13 because such claims are barred by the 24-month Incontestability Provision set forth in the
14 agreement among the parties dated as of March 31, 1993.

15 **ISSUE TWO:** In the alternative, each of Nye’s claims for fraudulent concealment,
16 fraudulent misrepresentation, and breach of fiduciary duty that arise from or are based on
17 participation statements issued prior to January 8, 2011, should be summarily adjudicated in
18 BVT’s favor, because such claims are barred by the three-year statute of limitations set forth in
19 Code of Civil Procedure Section 338(d).

20 **ISSUE THREE:** Also in the alternative, each of Nye’s claims for breach of contract,
21 accounting, breach of the covenant of good faith and fair dealing, and monies had and received,
22 that arise from or are based on participation statements issued prior to January 8, 2010 should be
23 summarily adjudicated in BVT’s favor, because such claims are barred by the four-year statute of
24 limitations set forth in Code of Civil Procedure Section 337.

25 **As to McKenna, Gottlieb, Ablesoft, and KCTS:**

26 **ISSUE FOUR:** Each of McKenna’s, Gottlieb’s, Ablesoft’s, and KCTS’s claims that arise
27 from or are based on participation statements issued prior to April 2, 2016 should be summarily

1 adjudicated in BVT's favor, because such claims are barred by the 24-month Incontestability
2 Provision set forth in the agreement among the parties dated as of March 31, 1993.

3 **ISSUE FIVE:** In the alternative, each of McKenna's, Gottlieb's, Ablesoft's, and KCTS's
4 claims for fraudulent concealment, fraudulent misrepresentation, and breach of fiduciary duty that
5 arise from or are based on participation statements issued prior to April 2, 2015, should be
6 summarily adjudicated in BVT's favor because such claims are barred by the three-year statute of
7 limitations set forth in Code of Civil Procedure Section 338(d).

8 **ISSUE SIX:** Also in the alternative, each of McKenna's, Gottlieb's, Ablesoft's, and
9 KCTS's claims for breach of contract, accounting, breach of the covenant of good faith and fair
10 dealing, and monies had and received that arise from or are based on participation statements
11 issued prior to April 2, 2014, should be summarily adjudicated because such claims are barred by
12 the four-year statute of limitations set forth in Code of Civil Procedure Section 337.

13 This Motion for Summary Adjudication is based on this Notice of Motion; the
14 accompanying Memorandum of Points and Authorities; the concurrently-filed declaration of
15 Christopher A. Elliott and exhibits thereto; the concurrently-filed Separate Statement of
16 Undisputed Material Facts; and the Request for Judicial Notice. This Motion also is based on all
17 pleadings and papers filed in this action at or before the hearing on this Motion, any Reply that
18 may be filed by BVT, all other matters of which the Court may or must take judicial notice, and all
19 other argument and evidence presented to the Court at or before the hearing on this Motion.

1 DATED: May 24, 2019

Respectfully submitted,

2 MITCHELL SILBERBERG & KNUPP LLP
3 LUCIA E. COYOCA
4 CHRISTOPHER A. ELLIOTT

5 By: /s/ Christopher A. Elliott
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs admit they had concerns about Buena Vista Television's accounting statements
4 as early as the 1990's, but did not file their complaint until August 2017.¹ After more than two
5 decades, witnesses have retired or died, and memories have faded. This is the very reason statutes
6 of limitations exist. Under any measure of the limitations period, the majority of claims are time-
7 barred.

8 In March 1993, Plaintiffs and BVT² entered into an agreement (the "Agreement") for
9 production and distribution of the television show "Bill Nye the Science Guy" (the "Series"). The
10 Agreement provides for Net Profits³ to be paid to Plaintiffs after deduction of distribution fees and
11 various costs and expenses from Gross Receipts. Plaintiffs had a right to audit, but none of them
12 did until Nye initiated one in January 2014. The Agreement expressly provides the participation
13 statements reporting on Net Profits ("the Statements") are "conclusive, incontestable, and final"
14 two years after they are delivered ("the Incontestability Provision"). Despite this provision,
15 Plaintiffs' claims are based on Statements issued as far back as 1994.

16 Under the continuous accrual doctrine, each Statement issued to Plaintiffs gave rise to a
17 separate right of action. Under *Lilienthal & Fowler v. Superior Court*, 12 Cal. App. 4th 1848
18 (1993), claims arising from each Statement may be separately summarily adjudicated, even if
19 doing so does not resolve an entire cause of action as Plaintiffs have pleaded it. Therefore, the
20 limitations periods that apply to Plaintiffs' claims must be analyzed based on when each Statement
21 issued.

22 When Nye provided notice on January 8, 2014 that he intended to audit, Defendants agreed
23 to toll all limitations periods as of that date. Any of Nye's claims that had expired as of January 8,

24 ¹ Plaintiff William Nye ("Nye") filed it on August 27, 2017. Cascade Public Media d/b/a KCTS-
25 TV ("KCTS"), James McKenna ("McKenna"), Erren Gottlieb ("Gottlieb") and Ablesoft Inc., f/k/a
Rabbit Ears Productions, Inc. ("Ablesoft") (collectively "Other Plaintiffs") joined the lawsuit later.

26 ² Buena Vista Television, LLC ("BVT") and The Walt Disney Company are collectively referred
27 to herein as "Defendants."

³ All capitalized terms not expressly defined herein have the meanings set forth in the Agreement.

2014 were already barred. Other Plaintiffs never audited or entered a tolling agreement. They only joined the lawsuit on April 2, 2018, so their claims arising from statements issued prior to April 2, 2016 are barred under the Incontestability Provision.

As to all Plaintiffs, if the Incontestability Provision is not applied, either the three-year or four-year statute of limitations applies to Plaintiffs' fraud and breach of contract claims. Regardless of whether the two-year Incontestability Provision or the three- or four-year statute of limitations apply, summary adjudication is required of most of Plaintiffs' claims.

II. SUMMARY OF RELEVANT FACTS

A. Negotiation of the Agreement

Nye, McKenna, and Gottlieb initially developed the idea for a "Bill Nye" science show in the late 1980's. (UMF 1.) They began working with KCTS, the Seattle affiliate of PBS, and Rabbit Ears Production, Inc. ("Rabbit Ears"),⁴ to develop a pilot, which aired in 1992. (UMF 2.)

In March 1993, BVT became aware of the pilot and expressed interest in producing the Series to Nye's agent, Paul Frank, at the William Morris Agency. (UMF 3.) Over the next several weeks between the end of March and April 16, 1993, the parties negotiated a written agreement. (UMF 4.) All of the parties were represented by counsel: Nye by Andrew Salter of Miller Nash, McKenna and Gottlieb by Marshall Nelson of Davis Wright and Tremaine, KCTS by in-house counsel, Rabbit Ears by Peter Nelson of Nelson, Guggenheim & Felker, and BVT by Werner, head of Business Affairs. (UMF 5-6, 59-61.) Frank also participated. (UMF 7.)

The Agreement was heavily negotiated. Multiple drafts were exchanged. (UMF 8.) Numerous changes were made in each parties' favor. (UMF 9.) Each Plaintiff reviewed the drafts of the Agreement with their counsel, and read it before signing. (UMF 10-11.) Executed copies were circulated on April 16, 1993. (UMF 12.)

⁴ Ablesoft alleges it is the successor to Rabbit Ears' interest under the Agreement. For the purposes of this Motion only, BVT assumes the truth of that allegation.

1 **B. Key Provisions of the Agreement**

2 In the Agreement, BVT agreed to pay Plaintiffs 50% of Net Profits. (UMF 13.) Paragraph
3 10 explains how Net Profits are calculated: certain specified receipts are included in Gross
4 Receipts; certain specified fees, expenses, and other costs are deducted from Gross Receipts; and
5 the amount remaining after the deductions are Net Profits. (UMF 14.) The parties agreed BVT
6 would issue Statements to Plaintiffs, “accompanied by payments due, if any, 90 days after the
7 close of each accounting period.” (UMF 15.)

8 Paragraph 19 gives Plaintiffs the right to audit the Net Profits reporting. (UMF 17.)
9 Plaintiffs have the right to examine “BVT’s books and records, to the extent they have not become
10 incontestable,” once in each 12-month period. (UMF 17.) Paragraph 19 also includes the terms of
11 the Incontestability Provision: “Statements will be deemed conclusive, incontestable and final 24
12 months after delivery, unless BVT has received specific, detailed objections from Owner⁵ within
13 the specified period.” (UMF 18.)

14 The Series began airing in 1993. It was subsequently renewed several times. There were
15 100 episodes produced. (UMF 20.) The parties agreed to amend the original Agreement four times
16 in connection with the renewals. (UMF 21.) But, the parties never amended the Incontestability
17 Provision. (UMF 21.)

18 **C. Statements Are Issued to Plaintiffs**

19 Beginning on July 7, 1994, and every quarter thereafter until June 30, 1998, Statements
20 were delivered to Plaintiffs in care of the William Morris Agency showing the accounting of Net
21 Profits.⁶ (UMF 22, 25.) During that period, no Net Profits were earned. (UMF 22.) On June 30,
22 1998, BVT’s participations department sent a letter to Plaintiffs accompanying the Statement
23 telling them it did not intend to send any further Statements because BVT did not forecast the
24 Series would reach Net Profits. (UMF 26.) The participations department invited Plaintiffs to
25

26 ⁵ Plaintiffs are the “Owner” under the Agreement. (UMF 19.)

27 ⁶ The Statements were sent by the participations department, a shared service group that handles
28 the participations accounting and reporting on behalf of BVT and its affiliates.

1 contact it if they wanted further information. (UMF 26.) Except for KCTS, none of the Plaintiffs
2 requested further Statements. (UMF 27.) Plaintiffs testified that around this time, they started to
3 have suspicions that BVT's accounting was not correct. (UMF 28.)

4 At KCTS's request, BVT provided additional Statements in 2000 and 2004. (UMF 62-63.)
5 At the time the 2004 Statement was sent to KCTS, the Series still had not begun earning Net
6 Profits. (UMF 64.) However, beginning with the 2005 Statement, the Series reached Net Profits
7 after all and BVT began issuing annual Statements and paying Net Profits to Plaintiffs. (UMF 32.)

8 **D. The 2008 Overpayment**

9 Net Profits were paid to Plaintiffs in 2005, 2006, 2007, and 2008. (UMF 33-36.) In 2008,
10 after issuing a Statement and paying Plaintiffs, BVT discovered the amount of video receipts
11 included in Gross Receipts had been miscalculated too high, and that Plaintiffs had thus been
12 overpaid. (UMF 37.)⁷ On July 22, 2008, the participations department wrote to Plaintiffs
13 explaining the error, provided a corrected summary of the Statement, and requested that Plaintiffs
14 repay the amounts that had been overpaid. (UMF 37.) On September 11, 2008, the participations
15 department sent a more detailed schedule further explaining the overpayment and a complete
16 revised statement. (UMF 38.)

17 Plaintiffs testified the 2008 overpayment led them to suspect BVT had committed other
18 errors. (UMF 39, 41-45, 65-70.) Nye testified that by 2008, he suspected that BVT was defrauding
19 Plaintiffs, and McKenna and KCTS held similar suspicions. (UMF 39, 65, 70.) Nye, KCTS, and
20 Ablesoft all separately contacted the participations department. (UMF 45, 72.) Nye told the Other
21 Plaintiffs (except Ablesoft) that his attorney, Salter, was communicating with the participations
22 department about the request for return of the overpayment amount. (UMF 45.)

23 The following year, on October 5, 2009, Salter sent a letter to Alan Braverman, TWDC's
24 General Counsel. He objected to the recoupment, requesting Braverman's assistance to resolve
25 "certain matters in dispute . . . concerning compensation." (UMF 47.) Salter contended BVT was

26 ⁷ The error occurred when Disney Educational Productions, an affiliate of BVT that distributed
27 videos of the Series to schools and libraries, incorrectly recorded 100% of those revenues to Gross
28 Receipts, rather than 20%, as called for under paragraph 10.5.A(ii) of the Agreement. (UMF 37.)

1 “in breach of its obligations under the 1993 contract,” and that BVT had not “properly
2 compensated” Nye “since the inception of the 1993 agreement.” (*Id.*) On November 4, 2009,
3 Braverman responded. He disagreed with Salter’s position, and noted Nye’s right to audit the
4 Statements. (UMF 50.) He told him that, if there was a practical way short of an audit to provide
5 further accounting information, BVT was willing to do so. (*Id.*) On February 3, 2010 Salter wrote
6 to Braverman again, reiterating that Nye had claims for breach of contract, detrimental reliance,
7 and negligent misrepresentation, and challenging deductions BVT had applied in calculating Net
8 Profits. (UMF 51.) On March 30, 2010, Braverman responded, again disputing Salter’s position
9 and again noting Nye’s right to audit. (UMF 52.)

10 **E. Nye’s Belated Audit**

11 Nearly four years passed before Nye took any further action. On January 8, 2014, Nye
12 requested an audit of BVT’s books and records. (UMF 54.) In response to Nye’s audit request,
13 BVT agreed to toll the Incontestability Provision and any statutes of limitations until the audit
14 began. (UMF 56.) After the audit commenced, at Nye’s request, BVT agreed to restart tolling,
15 which continued by agreement through August 23, 2017, when Nye filed this lawsuit. (*Id.*) The
16 Other Plaintiffs joined the lawsuit in the Second Amended Complaint filed on April 2, 2018.
17 (UMF 73.) None of the Other Plaintiffs ever conducted an audit of BVT or requested any tolling.
18 (UMF 74.)

19 **III. ARGUMENT**

20 Where the undisputed facts regarding a statute of limitations affirmative defense “are
21 susceptible of only one legitimate inference, summary judgment is proper.” *Jolly v. Eli Lilly &*
22 *Co.*, 44 Cal. 3d 1103, 1112 (1988) (affirming grant of summary judgment based on undisputed
23 facts where plaintiff asserted discovery rule delayed accrual of claim).

24 For summary adjudication, a defendant must produce evidence that negates an essential
25 element of the plaintiff’s case, establishes a complete defense to the plaintiff’s claims, or
26 demonstrates an absence of evidence to support the plaintiff’s case. *See Angelica Textile Services,*
27 *Inc. v. Park*, 220 Cal. App. 4th 495, 504 (2013). Absence of evidence may be shown through

(1) admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing; or (2) discovery responses that are factually devoid. *Chavez v. Glock, Inc.*, 207 Cal. App. 4th 1283, 1302 (2012); *see also Silva v. See's Candy Shops, Inc.*, 7 Cal. App. 5th 235, 259-260 (2016) (absence of evidence established where plaintiff provided factually devoid responses to interrogatories asking that she “state with particularity” all facts supporting her claim); *Collin v. CalPortland Co.*, 228 Cal. App. 4th 582, 590-591 (2014) (lack of causation inference raised where plaintiff’s responses to comprehensive interrogatories failed to state facts showing plaintiff was exposed to asbestos as a result of defendant’s activities).

Once the moving party’s burden is met, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of material fact with “substantial” responsive evidence. *Granadino v. Wells Fargo Bank, N.A.*, 236 Cal. App. 4th 411 (2015).

A. Plaintiffs’ Claims Accrued When Each Statement Was Issued

The purpose of time limitations on claims is “to promote the diligent assertion of claims, ensure defendants the opportunity to collect evidence while still fresh, and provide repose and protection from dilatory suits once excess time has passed.” *See Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185, 1191 (2013). BVT has the initial burden to show Plaintiffs’ claims are time-barred; thereafter, the burden shifts to Plaintiffs “to demonstrate [their] claims survive based on one or more non-statutory exceptions to the basic limitations period.” *Id.* at 1197.

Plaintiffs’ claims are based on Statements issued beginning on July 7, 1994. Under the “last element accrual rule,” Plaintiffs’ claims accrued on delivery of each Statement. A claim accrues when it is complete with all of its elements—those elements being wrongdoing, harm, and causation. *Aryeh*, 55 Cal. 4th at 1197, quoting *Pooshs v. Philip Morris USA, Inc.* 51 Cal. 4th 788, 797 (2011) (quotation marks omitted). Upon delivery of each Statement, if BVT did not pay Plaintiffs the amount owing, Plaintiffs purportedly were harmed, and the statute of limitations began running as to that Statement. Thus, each period must be separately calculated based on when each Statement was issued.

1 Despite having received Statements beginning in 1994, and annually since at least 2004,
2 Nye did not sue until August 23, 2017; the Other Plaintiffs did not sue until April 2, 2018.
3 (UMF 56, 74.) Because of their delay, Plaintiffs’ decades-old claims based on Statements issued
4 since 1994 are time-barred, either by the 24-month Incontestability Provision or the three-year
5 (fraud) and four-year (contract) statutes of limitations.

6 **B. Each Participation Statement Issued To Plaintiffs Gave Rise To A Separate**
7 **Cause Of Action That Can and Should Be Summarily Adjudicated**

8 The Court properly can and should look to the date each Statement was issued to determine
9 whether and which claims based on the Statement are time-barred. Each Statement gives rise to a
10 separate right of action that is subject to summary adjudication as to the new items included on
11 that Statement.

12 **1. Under the continuous accrual doctrine, claims based on each Statement**
13 **create a separate cause of action.**

14 Under the continuous accrual doctrine, whenever there is a continuing or recurring
15 obligation, such as BVT’s obligation to issue Statements and pay Net Profits, each breach of the
16 obligation creates a separate cause of action with a separate accrual date for purposes of the
17 Incontestability Provision and statutes of limitations. *See Aryeh*, 55 Cal. 4th at 1199, quoting
18 *Hogar Dulce Hogar v. Community Development Commission*, 110 Cal. App. 4th 1288, 1295
19 (2003)) (“When an obligation or liability arises on a recurring basis, a cause of action accrues each
20 time a wrongful act occurs, triggering a new limitations period.”). Because each breach of the
21 recurring obligation provides all the elements of a cause of action—a wrong, causation, and
22 harm—“each may be treated as an independently actionable wrong with its own time limit for
23 recovery.” *Id.* “The continuing accrual rule has been applied in a variety of actions involving the
24 obligation to make periodic payments under California statutes or regulations.” *Hogar*, 110 Cal.
25 App. 4th at 1295.⁸

26 _____
27 ⁸ *See, also, Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.*, 116 Cal. App. 4th 1375,
1388–89 (2004) (monthly payments on a gas and oil lease created a recurring obligation); *Conway*

1 The facts of *Aryeh* illustrate the continuous accrual doctrine well. There, plaintiff leased
2 copiers from Canon with a monthly copy allowance; if plaintiff exceeded the allowance, it was
3 required to pay an additional charge. 55 Cal. 4th at 1189-90. Plaintiff alleged Canon ran excessive
4 test copies when it periodically served the copiers, causing plaintiff to incur excess copy charges.
5 *Id.* at 1190. Plaintiff claimed this occurred during 17 service visits over a period of several years,
6 and sued for the entire period. Canon argued the statute of limitations barred the lawsuit because
7 plaintiff had discovered Canon’s practice more than four years before filing suit. *Id.* at 1197.
8 Applying the continuous accrual doctrine, the California Supreme Court ultimately held “each
9 alleged breach must be treated as triggering a new statute of limitations” because Canon had a
10 continuing duty not to impose unfair charges in monthly bills. *Aryeh*, 55 Cal. 4th at 1199-1200.
11 Therefore, the Court held plaintiff “cannot recover alleged excess charges preceding the four-year
12 limitations period, but is not foreclosed from seeking recovery for charges to the extent they fall
13 within that period.” *Id.* at 1200-1201.

14 Here, just as in *Aryeh*, BVT had a continuing duty: to issue Statements to Plaintiffs and
15 pay Net Profits if any were owed at that time. (UMF 15.) Each obligation to issue a Statement
16 accompanied by a payment if one was due could have been breached and, indeed, Plaintiffs now
17 claim they repeatedly were. Each time BVT purportedly did not comply with its obligation to
18 issue a Statement and pay Net Profits that were due, Plaintiffs purportedly were harmed,
19 constituting an “independently actionable wrong with its own time limit for recovery.” *Aryeh*, 55
20 Cal. 4th at 1199. Thus, under the continuous accrual doctrine, the Court must look to the date each
21 Statement issued to determine whether Plaintiffs’ time to contest the Statement has expired.

22
23
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25 _____
26 *v. Bughouse, Inc.*, 105 Cal. App. 3d 194, 199-200 (1980) (failure to make successive installment
27 payments); *Amie v. Superior Court*, 99 Cal. App. 3d 421, 426 (1979) (failure to make child
28 support payments); *Ryan v. Microsoft Corp.*, 147 F. Supp. 3d 868, 895 (N.D. Cal. 2015)
29 (“California courts have held that disputes regarding monthly billing and payments qualify for
continuous accrual, with each month triggering a new limitations period.”).

1 **2. Under *Lilienthal & Fowler v. Superior Court*, claims arising from each**
2 **individual Statement may be separately summarily adjudicated.**

3 Even though Plaintiffs chose to aggregate their claims into a single cause of action, each of
4 these separate occurrences can be separately adjudicated. *Lilienthal & Fowler v. Sup. Ct.*, 12 Cal.
5 App. 4th 1848, 1854-55 (1993) (“[W]e hold that under subdivision (f) of section 437c, a party may
6 present a motion for summary adjudication challenging a separate and distinct wrongful act even
7 though combined with other wrongful acts alleged in the same cause of action.”). Per *Lilienthal*,
8 “[t]o rule otherwise would defeat the time and cost saving purposes of the amendment and allow a
9 cause of action in its entirety to proceed to trial even where, as here, a separate and distinct alleged
10 obligation or claim may be summarily defeated by summary adjudication.” *Id.* at 1854.

11 *Edward Fineman Co. v. Superior Court*, 66 Cal. App. 4th 1110 (1998), illustrates this point.
12 Plaintiff sued a bank regarding payment of 83 checks over a period of years that plaintiff had not
13 authorized. The bank moved for summary adjudication as to 23 of the checks, arguing claims based
14 on those checks were barred by the statute of limitations. *Id.* at 1115. Plaintiff argued summary
15 adjudication was improper because it would not dispose of an entire cause of action. *Id.* at 1116.
16 The trial court granted summary adjudication as to the 23 checks, and plaintiff appealed. The Court
17 of Appeal affirmed, holding “just because [Plaintiff] has elected to aggregate its claims does not
18 forestall [Defendant] from segregating them for the purpose of assessing each check to determine if
19 it is barred” *Id.*

20 The facts here support the same result. Each Statement, if it resulted in a failure to pay
21 amounts that should have been paid to Plaintiffs, gave rise to a separate cause of action on which
22 Plaintiffs could have sued. Each can be separately adjudicated. This is supported by the
23 Incontestability Provision, which sets forth a separate 24-month Incontestability period for each
24 Statement. (UMF 18.) The parties expressly agreed each Statement was separately contestable,
25 and that such challenges must be made within a 24-month period. As in *Edward Fineman*, just
26 because Plaintiffs elected to aggregate their claims does not bar BVT from segregating them to
27 assess whether each is barred by the statute of limitations.

1 **C. Based On Either the Incontestability Provision or the Applicable Statutes of**
2 **Limitations, the Majority of Plaintiffs' Claims Are Time-Barred**

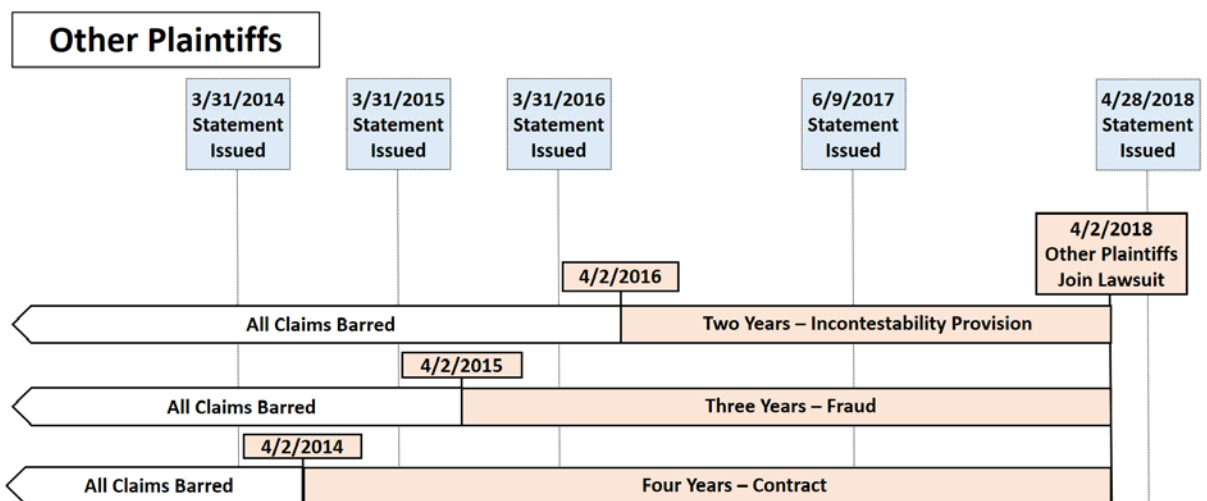
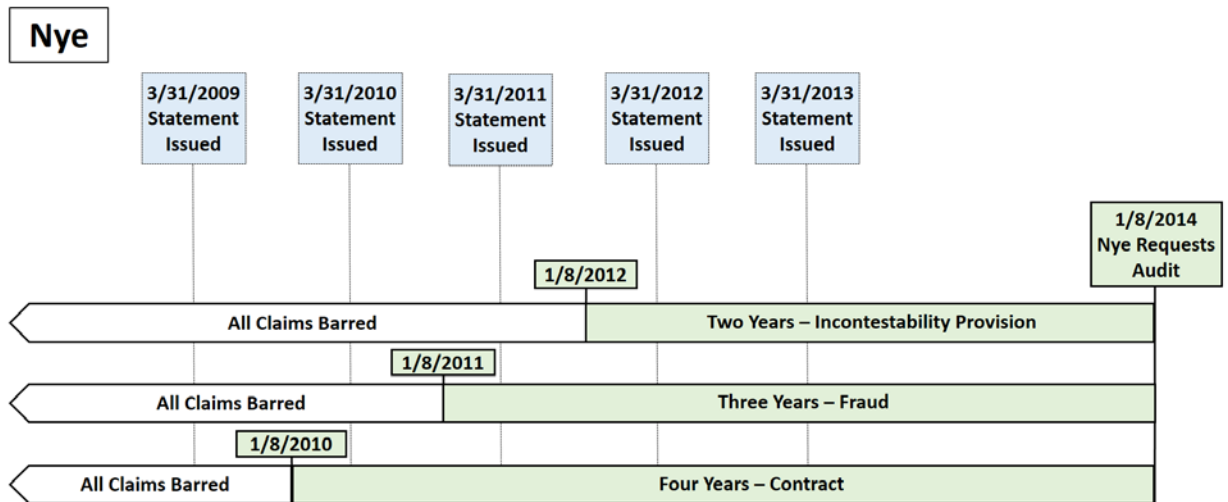
3 Analyzed on a Statement-by-Statement basis, under either the Incontestability Provision or
4 the statutes of limitations, nearly all of Plaintiffs' claims are barred. There is no ambiguity
5 regarding the meaning of the Incontestability Provision and that it is the applicable limitations
6 period. Plaintiffs testified they understood it to mean that if they did not object within 24 months
7 of delivery of the Statements, their claims were barred. (UMF 57, 75-78.) Even if analyzed under
8 the statutes of limitations (three years for fraud claims, four years for contract claims), the
9 majority of claims are still barred.

10 Nye requested an audit on January 8, 2014 (UMF 54). BVT agreed to toll the contractual
11 and statutory limitations period for any claims that had not already expired as of that date, but the
12 tolling did not affect claims already barred by January 8, 2014. (UMF 56.) Thus, Nye's claims
13 based on Statements issued prior to January 8, 2012 are barred by the Incontestability Provision.
14 This means that claims based on the March 31, 2011 Statement (for 2010 activity) are barred, as
15 are claims based on all prior statements. (UMF 53.)⁹ For the Other Plaintiffs, the analysis is
16 simpler. They did not bring their claims until they joined this lawsuit via the Second Amended
17 Complaint on April 2, 2018. (UMF 73.) Thus, their claims based on any Statements issued prior to
18 April 2, 2016 are barred by the Incontestability Provision.¹⁰

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23
24 ⁹ If the 24-month Incontestability Provision is not applied, Nye's fraud and contract based claims
25 must be analyzed under the applicable three- or four-year statutes of limitations respectively. Any
fraud claims based on the March 31, 2010 and earlier Statements are barred, and his contract
claims based on the March 31, 2009 and earlier Statements are barred.

26 ¹⁰ If the 24-month Incontestability Provision is not applied, the three-year statute of limitations
27 bars Other Plaintiffs' fraud claims based on Statements issued prior to April 2, 2015. Under the
four-year statute, Other Plaintiffs' breach of contract claims based on Statements issued prior to
April 2, 2014 are barred.

For the Court's convenience, below is a graph depicting these times periods and showing when Statements became time-barred:



1 **D. The Discovery Rule Does Not Save Plaintiffs' Claims**

2 Plaintiffs attempt to revive these claims by invoking the “discovery rule,” which delays
3 accrual until a plaintiff knows or has reason to suspect the existence of their cause of action.
4 However, Plaintiffs cannot meet their burden to show the discovery rule applies here. In the
5 Incontestability Provision, Plaintiffs agreed to a contractual accrual date (the date a Statement is
6 delivered) and 24-month contractual limitations period, thereby waiving application of the
7 discovery rule to claims based on the Statements. This provision is fully enforceable. *See Wind*
8 *Dancer Prod. Group v. Walt Disney Picts.*, 10 Cal. App. 5th 56, 76 (2017) (“On its face, the 24-
9 month limitations period agreed to by the parties is not unreasonable.”).

10 In *Wind Dancer*, the agreement similarly provided for a 24-month period to object to
11 statements and granted the participants the right to audit every 12 months. 10 Cal. App. 5th at 61.
12 As here, the *Wind Dancer* court noted that the parties were represented by experienced counsel
13 and agents and negotiated changes to the provisions relating to accounting for the series’ profits.
14 *Id.* As a result, “the producers were not precluded from waiving the discovery rule by expressly
15 agreeing to a shortened limitations period with a fixed accrual date.” *Id.* at 77.¹¹ Courts recognize
16 that sophisticated business parties represented by counsel, such as those involved here, can waive
17 the discovery rule by agreeing to a contractual accrual date. *Brisbane Lodging, L.P. v. Webcor*
18 *Builders, Inc.*, 216 Cal. App. 4th 1249, 1253–54 (2013). As explained in *Brisbane*:

19 By tying the running of the applicable statute of limitations to a date
20 certain, the parties here negotiated to avoid the uncertainty

21 ¹¹ On demurrer in this case, the Court declined to apply *Wind Dancer*, noting: “[i]n *Wind Dancer*,
22 unlike in this case, plaintiff did not allege claims for fraud or fraudulent concealment.” (Order on
23 Demurrer to TAC, p.4.) At the time the Court ruled, the *Wind Dancer* complaint was not before it.
24 It is now attached as Exhibit 1 to the Request for Judicial Notice filed in support of this motion. It
25 shows that in *Wind Dancer* the plaintiffs expressly alleged “CONCEALMENT OF
26 WRONGDOING,” claiming defendants had “taken steps to prevent the Artists and their
27 Production Companies from discovering Defendants’ wrongdoing.” (RJN, Ex. 1, ¶ 40.) In *Wind*
Dancer, just as here, plaintiffs alleged defendants had engaged in a pattern of inaccurate
accounting, failing to disclose revenues and misrepresenting expenses, and refusing to provide
requested information during audit. (*Id.* ¶¶ 41, 43.) Ultimately the court did not apply the
incontestability provision based on equitable estoppel and tolling claims, but held such
incontestability provisions are valid and enforceable. 10 Cal. App. 5th at 77. Here, Plaintiffs have
not alleged and cannot show a basis for equitable tolling or estoppel.

1 surrounding the discovery rule for the security of knowing the date
2 beyond which they would no longer be exposed to potential liability.
3 . . .[W]e conclude that sophisticated parties should be allowed to
4 strike their own bargains and knowingly and voluntarily contract in
5 a manner in which certain risks are eliminated and, concomitantly,
6 rights are relinquished.

7 *Brisbane*, 216 Cal. App. 4th at 1260-61.¹²

8 Here, the parties, represented by counsel, extensively negotiated the Agreement. (UMF 4-
9 12, 59-61.) They agreed “[s]tatements will be deemed conclusive, incontestable and final 24
10 months after delivery.” (UMF 18.) Thus, they agreed to a 24-month contractual limitations period,
11 and tied the running of that period to a date certain—delivery of the Statements. Plaintiffs could
12 verify whether they had any claims to assert during the 24-month limitation period because they
13 have the right to “examine” “BVT’s books and records, to the extent they have not become
14 incontestable” once every 12-month period. (UMF 17.) Thus, these sophisticated parties agreed to
15 allocate risk: Plaintiffs received the right to audit; in exchange they agreed to a limited period
16 during which they could challenge Statements. Defendants received certainty as to how long they
17 would be exposed to potential liability. Under *Brisbane* and *Wind Dancer*, this agreement is fully
18 enforceable.

19 **E. Even If the Discovery Rule Applies, Plaintiffs Knew or Were On Notice Of**
20 **Their Claims Over A Decade Ago**

21 Even if the discovery rule applies, Plaintiffs’ claims are still time-barred because they
22 knew or suspected they had claims more than four years before they filed a lawsuit or obtained
23 tolling. The discovery rule is an exception to the default rule of accrual. As with all such
24 exceptions, the burden is on Plaintiffs to establish it applies. *Aryeh*, 55 Cal. 4th at 1197 (“Canon
25 bears the initial burden of proving Aryeh’s claims are barred by section 17208’s four-year

26 ¹² See also *Harbor Court Assocs. v. Leo A. Daly Co.*, 179 F. 3d 147, 151 (4th Cir.1999) (applying
27 Maryland law, finding that waiver of discovery rule by contractual accrual date was enforceable,
28 noting “we are confirmed in our conclusion by the fact that the only courts to consider a
contractual accrual date provision have all enforced it”).

1 limitations period. ... Thereafter, the burden shifts to Aryeh to demonstrate his claims survive
2 based on one or more non-statutory exceptions to the basic limitations period.”) (citation omitted).

3 Under the discovery rule, the statute of limitations begins to run “when the plaintiff
4 suspects or should suspect that her injury was caused by wrongdoing, that someone has done
5 something wrong to her.” *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1110 (1988). Certainty as to
6 the cause of action is not required; the plaintiff need only “suspect[] a factual basis, as opposed to
7 a legal theory.” *State of California ex rel. Metz v. CCC Info. Servs., Inc.*, 149 Cal. App. 4th 402,
8 417 (2007), quoting *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397–398 (1999). Critically, a plaintiff
9 does not need to know the specific facts necessary to establish the cause of action for the statute to
10 begin running. All that is required is that the plaintiff “at least ‘suspects ... that someone has done
11 something wrong’ to him.” *Norgart*, 21 Cal. 4th at 397.

12 Based on such suspicions, it is incumbent on the plaintiff to make inquiries. “[W]ithin the
13 applicable limitations period, [the plaintiff] must ... seek to learn the facts necessary to bring the
14 cause of action in the first place....” *Norgart* at 398. Such inquiry notice is sufficient to start the
15 running of the statute of limitations. *Jolly*, 44 Cal.3d at 1110-1111 (“[T]he limitations period
16 begins once the plaintiff has notice or information of circumstances to put a reasonable person *on*
17 *inquiry*....” (emphasis in original, quote marks omitted)); *Britton v. Girardi*, 235 Cal. App. 4th
18 721, 725 (2015) (“[W]here there are facts sufficient to put one on inquiry notice, the fraud statute
19 of limitations starts running even when the defendant is a fiduciary.”).

20 **1. Certain purported errors were disclosed decades ago because they are**
21 **apparent on the face of the Statements.**

22 Plaintiffs allege they found the Statements were “dubious” and “suspicious” on their face.
23 (UMF 46.) Indeed, certain purported errors on which Plaintiffs’ claims are based appear on the
24 face of the Statements. For example, Plaintiffs contend that excess distribution fees were applied
25 in certain markets, but the Statements expressly show the percentage distribution fee applied to
26 each market. (UMF 24.) By simply looking at the Statement, Plaintiffs could know if the correct
27 percentage was applied. Similarly, Plaintiffs challenge the lack of any publishing receipts, but,

again, the Statements showed no publishing receipts were reported. (*Id.*) And Plaintiffs were expressly told in 2008 that 2006 Video Device receipts had been erroneously reported at 100% instead of 20%, and the correction was being made for that purpose. Now, years later, Plaintiffs are making the exact same claim—that BVT purportedly breached the Agreement by reporting Video Device receipts at 20% rather than 100%. (FAC ¶ 114.a.) Thus, Plaintiffs’ claims are barred because certain purported errors were disclosed to them decades ago.

2. Nye was on inquiry notice because he had suspicions decades before he sued that he was not properly being paid Net Profits.

Nye testified he believed BVT was wrongfully accounting to him since at least the late 1990's. (UMF 29-31.) Nye's contentions about wrongdoing were so strong that his attorney sent a series of letters to the General Counsel of TWDC beginning in 2009, accusing BVT of breach of contract and questioning "the overall accounting for Bill Nye." (UMF 47-49, 51.) Nye admits that, as of 1998, he was "very skeptical" of BVT's accountings that showed the Series did not owe Net Profits. (UMF 29.) Nye conveyed to Salter that he had "concerns about the profit participation statements" that were "increase[ing]" in "the late 1990s." (UMF 30.) Salter himself shared Nye's "suspicions" and "concerns" about the profit participation statements in the "late 1990s, early 2000 time frame," and he raised those concerns with Nye's agents at William Morris. (*Id.*)¹³ Salter even contacted potential auditors "to see if they had experience auditing TWDC, try to understand what it would cost, what would be entailed." (*Id.*) Nevertheless, Nye did not sue for more than a decade, nor did he audit to determine if there was in fact wrongdoing. (UMF 54-55.)

Nye's misgivings regarding the Statements solidified into a suspicion of fraud in 2008, when Plaintiffs received notice of the overpayment. (UMF 37, 39.) Nye admits the correction in 2008 led him to suspect BVT of fraud: "Q. And when did you develop that belief that Disney was

¹³ As Nye’s agent, Salter’s knowledge and suspicions are imputed to Nye. *Baxter v. State Teachers’ Ret. Sys.*, 18 Cal. App. 5th 340, 367 (2017) (“Included among the types of information that may be imputed from agent to principal are facts used to determine the date of accrual of a statute of limitations.”).

defrauding the owners? A. In 2008.” (UMF 39.) (*See also* UMF 41: “[I]n 2008 the discrepancies became quite apparent....”)

Moreover, Nye’s suspicions were not limited to just the 2008 overpayment. Indeed, Nye alleged the 2008 overpayment made him suspicious of whether BVT had honestly accounted to him from the beginning: “The disturbing size of the supposed ‘accounting error,’ coupled with the seeming indifference of both BVT and WDC, left Nye suspicious of the veracity”—not just the accuracy, but the veracity—“of the accounting statements he had been receiving from BVT over the years.” (UMF 40.)¹⁴ Moreover, on October 5, 2009, Salter wrote to Braverman challenging the entirety of BVT’s accounting: “We have two primary areas of dispute. Put simply, we are not convinced that Mr. Nye was ‘overpaid.’ And we are not convinced Mr. Nye has been properly compensated since the inception of the 1993 agreement.” (UMF 47.) Salter admits his letter accused BVT of breach of contract. (UMF 48.) He wrote again on February 3, 2010, setting forth “the ‘legal basis’ for Mr. Nye’s claims,” again asserting “Mr. Nye’s concern about the overall accounting for the Bill Nye the Science Guy show....” (UMF 51.) Nye concedes the letter challenged all of BVT’s accounting by alleging it “detailed specific objections to the accounting [and] challenged the validity of BVT’s payment calculations....” (UMF 49.)

Nye’s claims accrued and the statute of limitations began to run when Nye had suspicion of wrongdoing, causation, and harm, *i.e.*, that BVT’s failure to properly account had caused it to not pay him Net Profits. *Jolly*, 44 Cal. 3d at 1114 (“[T]he limitations period begins when the plaintiff suspects, or should suspect, that she has been wronged.”). Because Nye had sufficient knowledge to assert claims against BVT, he had sufficient knowledge for the statute to begin running. *See Miller v. Bechtel Corp.*, 33 Cal. 3d 868, 875 (1983) (Where plaintiff’s attorneys “specifically sought information regarding the method used to establish a value for the shares, and

¹⁴ Nye’s pleading that the 2008 error made him suspicious of the veracity of the Statements “constitute[s] a judicial admission[.]. ... Such admissions are conclusive concessions of the truth of a matter and effectively remove it from the issues.” *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 209 Cal. App. 4th 1118, 1127 (2012), quoting *Foxborough v. Van Atta*, 26 Cal. App. 4th 217, 222 n.3 (1994).

1 threatened to file suit if the information sought was not forthcoming..., she is charged with
2 knowledge of facts which would have been revealed if she had pursued the investigation.”).

3 Nevertheless, even though Nye suspected fraud in 2008, and accused BVT of breach of
4 contract and claimed he had not properly been paid in 2009, Nye did not begin an audit or seek
5 tolling until January 8, 2014. (UMF 54.) By the time tolling began, not only the Incontestability
6 Period, but also the three- and four-year statutes of limitations had run since Nye discovered his
7 claims. Thus, Nye cannot rely on the discovery rule to save any of his time-barred claims.

8 **3. Other Plaintiffs’ claims are barred because they also were on inquiry**
9 **notice decades before filing suit.**

10 The Other Plaintiffs received the same 2008 notice regarding the overpayment, and it led
11 them to suspect that BVT’s accountings were erroneous. (UMF 37-38, 65-70.) Moreover, each
12 Other Plaintiff except Ablesoft discussed with Nye that they were “very skeptical” of and
13 “concerned” about BVT’s accountings as early as 1998.¹⁵ (UMF 28, 31.)

14 McKenna testified that he was skeptical that the 2008 overpayment had been a mistake:

15 At that time I was starting to become skeptical. I thought that maybe
16 what had happened is that we received finally our royalty payments.
17 ... And then ... somebody in the accounting department must have
18 sent us the correct amount, but then within Disney’s accounting—
we never—you don’t do that, no. So we have to come up with some
excuse as to explain why you’re not getting what you deserve.

19 (UMF 65.) And, after receiving notice of the 2008 overpayment, McKenna began to suspect there
20 were other problems with the accounting. (UMF 66.)

21 For Gottlieb, the 2008 correction also caused her to suspect it may have been intentional.
22 (UMF 67.) She also testified the Statements were “dubious” and “suspicious” because of the
23 amount of the deductions claimed in light of the contributions made by third parties to the cost of
24 the production of the Series. (UMF 68.)

25
26 ¹⁵ Further, as to Ablesoft, it has no information regarding what its alleged predecessor Rabbit Ears
27 suspected or did not suspect, and therefore cannot meet its burden to show the discovery rule
28 applies to it. (UMF 71.)

1 The 2008 error also made KCTS skeptical of BVT's accountings. After receiving notice of
2 the error, KCTS's finance and budget manager, Tula Urdaz-White, contacted Jeff Bowen, who
3 sent the July 22, 2008 letter, and told him "that we were concerned that had there been other
4 errors...." (UMF 69.) Further, KCTS was suspicious of fraud: when discussing the overpayment
5 internally, KCTS's CEO said "Are we sure they're just not taking us for something?" (UMF 70.)

6 Despite being suspicious of and on notice of their potential claims no later than 2008, none
7 of the Other Plaintiffs attempted to audit, none of them asked for or obtained a tolling agreement,
8 and they did not sue until they joined this lawsuit when the Second Amended Complaint was filed
9 on April 2, 2018. (UMF 73-74.) The discovery rule therefore does not save any of their claims,
10 and summary adjudication of their time-barred claims is required.

11 **IV. CONCLUSION**

12 The undisputed facts are clear. Analyzing Plaintiffs' claims on a Statement-by-Statement
13 basis, the 24 month Incontestability Provision, or at the very least, the applicable statutes of
14 limitations, bar the majority of Plaintiffs' claims. The discovery rule does not mandate a different
15 result. Plaintiffs delayed far too long before filing this lawsuit. They testified under oath that their
16 suspicions about inaccurate reporting of Net Profits began in the 1990's, but they forwent their
17 right to audit. By exercising that right, they could have discovered if they had any valid claims
18 decades ago. Permitting Plaintiffs to proceed now undermines the very purpose of the
19 Incontestability Provision and statutes of limitations. Defendants request that the Court grant this
20 Motion in its entirety.

21 DATED: May 24, 2019

Respectfully submitted,
MITCHELL SILBERBERG & KNUPP LLP
LUCIA E. COYOCA
CHRISTOPHER A. ELLIOTT

25 By: /s/ Christopher A. Elliott
Lucia E. Coyoca
Christopher A. Elliott
Attorneys for Defendants
The Walt Disney Company and Buena Vista
Television, LLC

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles, State of California, I am over the age of
4 eighteen years and am not a party to this action; my business address is Mitchell Silberberg &
Knupp LLP, 2049 Century Park East, 18th Floor Los Angeles, CA 90067.

5 On May 24, 2019, I served a copy of the foregoing document(s) described as
6 **DEFENDANT BUENA VISTA TELEVISION, LLC'S NOTICE OF MOTION AND**
7 **MOTION FOR SUMMARY ADJUDICATION OF CLAIMS BASED ON**
8 **INCONTESTABILITY PROVISION AND STATUTES OF LIMITATION;**
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF on the
interested parties in this action at their last known address as set forth below by taking the action
described below:

9 Martin J. Barab, Esq.
10 A. Raymond Hamrick, III, Esq.
11 Charles C. Rainey, Esq.
12 Hamrick & Evans, LLP
2600 West Olive Ave.
Suite 1020
Burbank, CA 91505

13 Phone: (818) 763-5292
14 Fax: (818) 763-2308

Email: mbarab@hamricklaw.com
15 aray@hamricklaw.com
16 crainey@hamricklaw.com

17 ☒ **BY PERSONAL DELIVERY:** I placed the above-mentioned document(s) in sealed
18 envelope(s), and caused personal delivery by **NATIONWIDE LEGAL LLC** of the
document(s) listed above to the person(s) at the address(es) set forth above.

19 I declare under penalty of perjury under the laws of the State of California that the above is
true and correct.

20 Executed on May 24, 2019, at Los Angeles, California.

21
22
23 /s/ Bertha A. García

Bertha A. García

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California.

I am over the age of 18, and not a party to the within action; my business address is
NATIONWIDE LEGAL LLC, 1609 James M. Wood Blvd., Los Angeles, CA 90015.

On May 24, 2019, I served the foregoing document(s) described as **DEFENDANT
BUENA VISTA TELEVISION, LLC'S NOTICE OF MOTION AND MOTION FOR
SUMMARY ADJUDICATION OF CLAIMS BASED ON INCONTESTABILITY
PROVISION AND STATUTES OF LIMITATION; MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF** which was enclosed in sealed envelopes addressed
as follows, and taking the action described below:

Martin J. Barab, Esq.
A. Raymond Hamrick, III, Esq.
Charles C. Rainey, Esq.
Hamrick & Evans, LLP
2600 West Olive Ave.
Suite 1020
Burbank, CA 91505

Phone: (818) 763-5292

☒ **BY PERSONAL SERVICE:** I hand delivered such envelope(s):

☐ to the addressee(s);

☐ to the receptionist/clerk/secretary in the office(s) of the addressee(s).

☐ by leaving the envelope in a conspicuous place at the office of the addressee(s)
between the hours of 9:00 a.m. and 5:00 p.m.

I declare under penalty of perjury under the laws of the State of California that the above is
true and correct.

Executed on May 24, 2019, at Los Angeles, California.

Printed Name

Signature

PROOF OF SERVICE



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Make a Reservation

WILLIAM S NYE VS WALT DISNEY COMPANY ET AL

Case Number: BC673736 Case Type: Civil Unlimited Category: Contractual Fraud

Date Filed: 2017-08-24 Location: Stanley Mosk Courthouse - Department 20

Reservation

Case Name: WILLIAM S NYE VS WALT DISNEY COMPANY ET AL	Case Number: BC673736
Type: Motion for Summary Judgment	Status: RESERVED
Filing Party: Buena Vista Television , LLC (Defendant)	Location: Stanley Mosk Courthouse - Department 20
Date/Time: 07/29/2019 8:30 AM	Number of Motions: 1
Reservation ID: 370794604324	Confirmation Code: CR-BQGTWP9YP8UXZPKEV

Fees

Description	Fee	Qty	Amount
Motion for Summary Judgment	500.00	1	500.00
Credit Card Percentage Fee (2.75%)	13.75	1	13.75
TOTAL			\$513.75

Payment

Amount: \$513.75	Type: MasterCard
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